

08 CV 5176

JUDGE PATTERSONUNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Urban Radio I, L.L.C.
3 Park Avenue, 40th Floor
New York, NY 10016

Plaintiff,

vs.

Federal Communications Commission
Room 8-A471
445 12th Street, SW
Washington, DC 20554

Defendant.

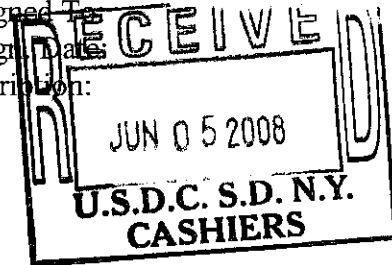
**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Case: 08 CV 5176

Assigned To:

Assigned Date:

Description:

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF****Preliminary Statement**

1. This is an action under the Freedom of Information Act, as amended, 5 U.S.C. §552 ("FOIA"), for declaratory, injunctive, and other appropriate relief, seeking, principally, the immediate production of unredacted agency records requested by Urban Radio I, L.L.C. ("Urban Radio") from defendant Federal Communications Commission (the "FCC").

2. The FCC has violated FOIA by: (i) improperly withholding and redacting responsive records, including failing to produce reasonably segregable portions of withheld responsive records; (ii) conducting an inadequate search for requested records; and (iii) failing to respond to Urban Radio's administrative appeals within the time limits mandated by FOIA.

3. Urban Radio seeks: (i) a declaration that the records sought are subject to disclosure under FOIA; (ii) affirmative injunctive relief requiring the FCC to immediately

produce all responsive records that have been unlawfully withheld or redacted, and to conduct an adequate search for requested records; and (iii) an award of reasonable attorneys' fees and other litigation costs.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

6. Declaratory relief is authorized by 28 U.S.C. §§ 2201-2202 and Rule 57 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 57.

Parties

7. Plaintiff Urban Radio is a Delaware limited liability company with its principal place of business located at 3 Park Avenue, 40th Floor, New York, New York 10016. Urban Radio is the licensee of commercial radio station WBLS(FM), FCC Facility ID No. 28203 ("WBLS"). WBLS's community of license is New York, NY.

8. Defendant, the FCC, is an independent United States government regulatory agency. The FCC is an agency within the meaning of 5 U.S.C. § 552(f)(1).

Factual Allegations

9. On January 31, 2006, Urban Radio filed its Application for Renewal of License for WBLS, File No. BRH-20060131AXZ (the "Renewal Application"), with the FCC, which the FCC "accepted for filing" on February 2, 2006. The current status of the Renewal Application is "pending" because the FCC has taken no action on the Renewal Application.

10. On February 6, 2008, counsel for Urban Radio sent, via e-mail, two FOIA requests on Urban Radio's behalf to the FCC pursuant to §0.461 of the FCC's rules, 47 C.F.R.

§0.461. One of the FOIA requests (the “FOIA Request for Indecency Records”) sought “copies of any and all records concerning indecency complaints and/or proceedings regarding WBLS.” A copy of the FOIA Request for Indecency Records is attached as Exhibit A. The other FOIA request (the “FOIA Request for Sponsorship Records”) sought “copies of any and all records concerning sponsorship identification complaints and/or proceedings regarding WBLS.” A copy of the FOIA Request for Sponsorship Records is attached as Exhibit B.

11. On February 7, 2008, counsel for Urban Radio received two e-mails from Patricia Quartey, a member of the FCC's staff, acknowledging FCC receipt of the FOIA Request for Indecency Records and the FOIA Request for Sponsorship Records and providing an anticipated response date by the FCC with respect to both FOIA requests of March 6, 2008. These e-mails are attached as Exhibit C.

12. On March 14, 2008, counsel for Urban Radio received an e-mail from William Knowles-Kellett, Esq., an FCC staff member, informing counsel for Urban Radio that the FCC, pursuant to 5 U.S.C. § 552(a)(6)(b)(i), was extending the deadline for its responses to both FOIA requests by 10 working days, to March 20, 2008. This e-mail is attached as Exhibit D.

13. On March 20, 2008, counsel for Urban Radio received a telephone call from William Knowles-Kellett, Esq., an FCC staff member, requesting a one-week extension to the March 20, 2008 deadline. On March 20, 2008, counsel for Urban Radio sent an e-mail to William Knowles-Kellett, Esq., an FCC staff member, granting the requested one-week extension to the March 20, 2008 deadline and specifying that, as a result of the extension, Urban Radio expected the FCC to fully respond to both FOIA requests on or before March 27, 2008. This e-mail is attached as Exhibit E.

14. On March 21, 2008, counsel for Urban Radio received by e-mail from Debbie Byrd, an FCC staff member, the FCC's response to the FOIA Request for Indecency Records (the "Indecency Response"). The Indecency Response contained a cover letter from Gary Schonman, Acting Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, stating that the FCC had "located six pages of documents responsive to your request, copies of which are enclosed." In addition, Mr. Schonman's letter stated that the FCC had "redacted information from those documents, where necessary, to protect individuals' personal privacy. *See* 5 U.S.C. §552(b)(6)." The Indecency Response is attached as Exhibit F.

15. The six pages of redacted documents provided in the Indecency Response consisted of three, two-page FCC records which appear to be printouts of screens from the FCC's computer system (the "Printouts") recording three complaints received by the FCC concerning WBLS programming (the "Complaints"). For each of the Printouts, the FCC redacted the same categories of information. These redactions include: the full titles of the Printouts; the "Current Status" of the Complaints; the name of the FCC employee to which the Complaints were assigned; the name of the FCC employee for which the Complaints were "Closed By;" the "Service Date[s]" of the Complaints; the "Indecency Referral Code[s]" with respect to the Complaints; and the names and addresses of the individuals who submitted the Complaints. In addition, the FCC failed to provide copies of the actual Complaints submitted which underlie the processing of the three Printouts.

16. No further response from the FCC concerning the FOIA Request for Sponsorship Records was received by counsel for Urban Radio on or before March 27, 2008. Therefore, by operation of FOIA, the FOIA Request for Sponsorship Records was deemed denied.

17. On April 2, 2008, counsel for Urban Radio filed a “Review of Freedom of Information Action” with the FCC due to the inadequacy of the Indecency Response (the “Indecency Appeal”). The Indecency Appeal sought unredacted copies of the records provided in the Indecency Response as well as any and all other records in the FCC’s possession responsive to the FOIA Request for Indecency Records. The Indecency Appeal is attached as Exhibit G.

18. On April 2, 2008, counsel for Urban Radio filed a “Review of Freedom of Information Action” with the FCC due to the FCC’s failure to provide any response to the FOIA Request for Sponsorship Records (the “Sponsorship Appeal”). The Sponsorship Appeal sought entire, unredacted copies of any and all records responsive to the FOIA Request for Sponsorship Records. The Sponsorship Appeal is attached as Exhibit H.

19. On April 9, 2008, counsel for Urban Radio received by e-mail from William Knowles-Kellett, Esq., an FCC staff member, the FCC’s response to the FOIA Request for Sponsorship Records as an attached file (the “Sponsorship Response”). The Sponsorship Response only consisted of a one-page letter from Gary Schonman, Acting Deputy Chief, Investigations and Hearings Division, Enforcement Bureau. Mr. Schonman wrote that the Commission had “not located any copies of complaints and [has] no pending proceedings against Station WBLS(FM),” but had “located 13 pages of documents relating to sponsorship identification that reference Station WBLS(FM).” According to Mr. Schonman, however, the Commission would not disclose those documents because it found “that these pages are exempt from disclosure under Exemption 7 of the FOIA because [] the release of these documents is likely to interfere with pending and/or prospective enforcement proceedings. *See* 5 U.S.C. § 552(b)(7).” The Sponsorship Response is attached as Exhibit I.

20. As a consequence of receiving the Sponsorship Response, on April 16, 2008, counsel for Urban Radio filed a "Supplement to Review of Freedom of Information Action" with the FCC to supplement the Sponsorship Appeal in order to address the inadequacy of the untimely Sponsorship Response. This supplemental filing is attached as Exhibit J.

21. To date, the FCC has failed to respond to the Indecency Appeal. Under 5 U.S.C. § 552(a)(6)(A)(ii), the FCC had 20 days from its receipt of the Indecency Appeal, or until April 30, 2008, to make a determination with respect to the appeal.

22. To date, the FCC has failed to respond to the Sponsorship Appeal. Under 5 U.S.C. § 552(a)(6)(A)(ii), the FCC had 20 days from its receipt of the Sponsorship Appeal, or until April 30, 2008, to make a determination with respect to the appeal.

23. Urban Radio is therefore deemed to have exhausted its administrative remedies under FOIA. *See* 5 U.S.C. § 552(a)(6)(C)(i).

Counts for Relief

Count One: Failure to Provide Responsive Records

24. Urban Radio realleges and incorporates paragraphs 1-23.

25. On February 6, 2008, Urban Radio properly submitted to the FCC both the FOIA Request for Indecency Records and the FOIA Request for Sponsorship Records, requesting records that are public records subject to FOIA.

26. In response to the FOIA Request for Indecency Records, the FCC failed to provide all reasonably segregable portions of the 6 pages of responsive documents contained in the Indecency Response despite the near certainty that the redacted portions are not exempt under FOIA.

27. The FCC improperly relied on the exemption under 5 U.S.C. §§ 552(b)(6) in redacting portions of the records provided in the Indecency Response.

28. Accordingly, the FCC's redaction of the documents responsive to the FOIA Request for Indecency Records is improper and violates FOIA.

29. In response to the FOIA Request for Sponsorship Records, the FCC failed to provide reasonably segregable portions of the 13 pages of withheld responsive records, as required by 5 U.S.C. § 552(b) and despite the near certainty that some portions of the 13 pages of responsive records are reasonably segregable.

30. The FCC improperly relied on the exemption under 5 U.S.C. §§ 552(b)(7) in withholding records responsive to the FOIA Request for Sponsorship Records.

31. Accordingly, the FCC's withholding of documents responsive to the FOIA Request for Sponsorship Records is improper and violates FOIA.

**Count Two:
Failure to Conduct an Adequate Search for Responsive Records**

32. Urban Radio realleges and incorporates paragraphs 1-31.

33. On February 6, 2008, Urban Radio properly submitted to the FCC the FOIA Request for Indecency Records, requesting records that are public records subject to FOIA.

34. The FCC conducted an inadequate search for records responsive to the FOIA Request for Indecency Records in violation of 5 U.S.C. § 552(a)(3).

35. Upon information and belief, the FCC possesses the Complaints upon which the records in the Indecency Response were based.

36. The FCC did not include the Complaints with the Indecency Response, despite the near certainty that records of such Complaints are in the possession of the FCC.

37. Accordingly, the FCC's failure to adequately search for and produce these Complaints is improper and violates FOIA.

**Count Three:
Failure to Make a Determination Within the Statutory Time Limits**

38. Urban Radio realleges and incorporates paragraphs 1-37.

39. On February 6, 2008, Urban Radio properly submitted to the FCC both the FOIA Request for Indecency Records and the FOIA Request for Sponsorship Records, requesting records that are public records subject to FOIA.

40. On April 2, 2008, Urban Radio properly filed both the Indecency Appeal and the Sponsorship Appeal with the FCC after the FCC failed to provide any substantive response to Urban Radio concerning either the Indecency Appeal or the Sponsorship Appeal within the mandatory time limit prescribed by 5 U.S.C. § 552(a)(6)(A)(ii).

41. The FCC's failure to make a determination with respect to either the Indecency Appeal or the Sponsorship Appeal within the prescribed time limit is improper and violates FOIA.

WHEREFORE, Urban Radio respectfully requests that this Court:

A. Declare that the FCC's withholding of records responsive to the FOIA Request for Sponsorship Records is unlawful under FOIA.

B. Declare that the FCC's failure to provide reasonably segregable portions of the 13 pages of withheld records responsive to the FOIA Request for Sponsorship Records is unlawful under FOIA.

C. Declare that the FCC's redaction of portions of the records contained in the Indecency Response is unlawful under FOIA.

D. Declare that the FCC's failure to conduct an adequate search for the records requested in the FOIA Request for Indecency Records is unlawful under FOIA.

E. Declare that the FCC's failure to make a determination with respect to the Indecency Appeal within the statutory time limit is unlawful under FOIA.

F. Declare that the FCC's failure to make a determination with respect to the Sponsorship Appeal within the statutory time limit is unlawful under FOIA.

G. Enter an affirmative injunction that directs the FCC to search for and make all records responsive to the FOIA Request for Indecency Records available to Urban Radio, unredacted, and without any further delay.

H. Enter an affirmative injunction that directs the FCC to search for and make all records responsive to the FOIA Request for Sponsorship Records available to Urban Radio, unredacted, and without any further delay.

I. Award Urban Radio reasonable attorneys' fees and other litigation costs.

J. Grant Urban Radio any further relief this Court deems just and proper.

Respectfully Submitted,



By Corrine A. Irish (Bar No. ci1106)
Holland & Knight LLP
195 Broadway
24th Floor
New York, NY 10007
(212) 513-3200 Phone
(212) 385-9010 Fax
Corrine.irish@hklaw.com
Counsel for Plaintiff

Of Counsel:

Charles R. Naftalin
Charles D. Tobin
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
(202) 955-3000 Phone
(202) 955-5564 Fax
Counsel for Plaintiff